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RECONSTRUCTING ATTICUS FINCH

Steven Lubet*

TO KILL A MOCKINGBIRD. First Edition. By *Harper Lee*. Philadelphia: J.B. Lippincott Company. 1960. Pp. 296.

I. INTRODUCTION

Atticus Finch.

No real-life lawyer has done more for the self-image or public perception of the legal profession than the hero of Harper Lee's novel, *To Kill a Mockingbird*.¹ For nearly four decades, the name of Atticus Finch has been invoked to defend and inspire lawyers, to rebut lawyer jokes, and to justify (and fine-tune) the adversary system. Lawyers are greedy. What about Atticus Finch? Lawyers only serve the rich. Not Atticus Finch. Professionalism is a lost ideal. Remember Atticus Finch.²

In the unreconstructed Maycomb, Alabama of the 1930s, Atticus was willing to risk his social standing, professional reputation, and even his physical safety in order to defend a poor, black laborer falsely accused of raping a white woman. Serving for no fee, Atticus heard the call of justice.³ His defense was doomed to

* Professor of Law, Northwestern University. J.D. 1973, Boalt Hall. — Ed. I am grateful for helpful comments from Kathy Abrams, Frank Adams, Ann Althouse, Mary Becker, Monroe Freedman, Timothy Hoff, Wythe Holt, Jane Larson, Dorothy Roberts, and faculty workshop participants at the University of Alabama. Many thanks to Alex Rose, Northwestern University School of Law class of 1999, for thoughtful and creative research assistance.

1. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960). A word about footnotes: This review discusses one of the most widely read novels in all of American literature, having sold more than 10,000,000 copies worldwide. See *Best Sellers: List of World's Best Selling Books*, DAILY MIRROR, June 12, 1995, at 7. I assume that the outline of the story is well known. Consequently, I typically cite to the book only when quoting directly from the text and not when paraphrasing or engaging in general exposition. All references are to the First Edition (J.B. Lippincott, 1960).

2. To Professor Thomas Shaffer, for example, Atticus Finch was "a truthful person. He was truthful within his community and, more importantly, he was truthful to himself." Thomas L. Shaffer, *On Lying For Clients*, 71 NOTRE DAME L. REV. 195, 211 (1996); see also Thomas L. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181, 188 (1981) (to the same effect). But see Monroe H. Freedman, *Atticus Finch — Right and Wrong*, 45 ALA. L. REV. 473, 475-77 (1994) (arguing that Atticus was not so truthful after all). As to whether Atticus's defense of Tom Robinson was actually "true," see *infra* section III.

3. Monroe Freedman argues convincingly that Atticus did not risk his true social standing by taking up the defense of Tom Robinson. Indeed, the "better folks" in Maycomb silently supported his efforts. See Freedman, *supra* note 2, at 480-81. Freedman also points out that Atticus seemed to be blithely disinterested in the terrorism of the Ku Klux Klan. See *id.* at 473-75. But that's another story.

failure by the very nature of Southern life, but Atticus nonetheless succeeded in demonstrating both the innocence of his client and the peculiar sickness of Jim Crow society. Through his deft, courtly, and persistent cross examination, Atticus made it apparent to everyone that Tom Robinson was being scapegoated for a crime that had not even occurred. He even made Tom's innocence apparent to the all-white jury, which deliberated for an unprecedented several hours⁴ even though the judgment of conviction was a foregone conclusion.

So Atticus Finch saves us by providing a moral archetype, by reflecting nobility upon us, and by having the courage to meet the standards that we set for ourselves but can seldom attain. And even though he is fictional, perhaps because he is fictional, Atticus serves as the ultimate lawyer.⁵ His potential justifies all of our failings and imperfections.⁶ Be not too hard on lawyers, for when we are at our best we can give you an Atticus Finch.⁷

But what if Atticus is not an icon? What if he was more a man of his time and place than we thought? What if he were not a beacon of enlightenment, but just another working lawyer playing out his narrow, determined role?

This review considers the possibility that Atticus Finch was not quite the heroic defender of an innocent man wrongly accused. What if Mayella Ewell was telling the truth? What if she really was raped (or nearly raped) by Tom Robinson? What do we think then of Atticus Finch? Is he still the lawyers' paragon? Were his defense tactics nonetheless acceptable? Does his virtue depend at all on Tom's innocence, or is it just as noble to use one's skills in aid of the guilty? And if we can answer those questions, what conclusions may we draw about contemporary law practice?

4. One juror, it seems, actually voted for acquittal on the first ballot. See p. 235.

5. See, e.g., Timothy Hoff, *Influences on Harper Lee: An Introduction to the Symposium*, 45 ALA. L. REV. 389, 398-99 (1994) (stating that Atticus is too good to be true); Teresa Godwin Phelps, *The Margins of Maycomb: A Rereading of To Kill a Mockingbird*, 45 ALA. L. REV. 511, 511 (1994) (stating that Atticus is revered as the model lawyer); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 189 (1990) (stating that Atticus Finch is a fantasy role model for the legal academy); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1037 (1995) (stating that Atticus Finch is celebrated in the professional lore).

6. Both Whitewater independent counsel Kenneth Starr and President Clinton's personal attorney, David Kendall, have invoked Atticus Finch to justify their tactics in the contentious investigation. See David E. Kendall, *To Distort a Mockingbird*, N.Y. TIMES, June 3, 1998, at A25.

7. Not to mention the Pulitzer Prize in 1961 and several Academy Awards in 1962. For details, see Hoff, *supra* note 5, at 389-90. Most recently, the cinema version of *To Kill a Mockingbird* was voted number 34 on the American Film Institute's survey of the 100 best American movies of all time. See *Voters Pick the 100 Best American Movies*, N.Y. TIMES, June 17, 1998, at E3.

Part II sets out three differing narratives of the trial, each of which can be distilled from the pages of *To Kill a Mockingbird*: Scout's story, Tom's story, and Mayella's story. Confronted with conflicting facts, Part III discusses the ways that Atticus Finch might have resolved them, and how he might have shaped his advocacy to fit his understanding of the truth.

II. THREE NARRATIVES

The text of *To Kill a Mockingbird* contains three distinct narratives of the Atticus Finch story. Two of these stories, as told by Scout, Atticus's daughter, and Tom Robinson, his client, provide the time-honored saga of the virtuous lawyer. The third, barely audible, narrative is that of Mayella Ewell, Tom's accuser. Mayella's story, conveyed to us through Scout's eyes, is told only to be discredited. Though she is pitied as much as censured, the ultimate lesson about Mayella is, above all else, that she is not to be trusted.

A. *Scout's Story*

Jean Louise Finch, known to everyone as Scout, is Atticus Finch's seven-year-old daughter. We learn of Atticus's exploits only through the child's narration; indeed, Scout is our only source of knowledge of Maycomb, Alabama. Although others witnessed the key events, including Scout's brother, Jem, and their friend, Dill, it is Scout alone who tells the story. She is our witness to Atticus as he explains his initial reservations about being appointed to represent Tom Robinson. She sees him, and ultimately helps him, face down a lynch mob outside of Tom's jail cell. Most significantly, Scout chronicles the trial of Tom Robinson, providing her own assessment of the credibility of the witnesses.

Scout's narrative has been characterized, by none other than Harper Lee herself, as "a love story pure and simple."⁸ And that is what it is. Atticus can do no wrong. All of his choices are brave and noble, which is why the community of Maycomb ultimately puts its faith in him. Whether saving the town from a rabid dog, representing the county in the state legislature, or exposing the people to their own juridic hypocrisy, Atticus, at least in Scout's eyes, can be counted on to do the right thing.

Thus, Scout's story of the trial is elegant and simple. Mayella and her father, Robert E. Lee Ewell, are simply lying about the rape. Mayella is lying out of shame, and to protect herself from scorn and humiliation, after having been caught aggressively embracing a black man. Bob, as the elder Ewell is known, is lying out

8. See Hoff, *supra* note 5, at 392; see also Sharon Bond, *To Kill a Mockingbird Author Holds to Her Long Literary Silence*, DALLAS MORNING NEWS, Sept. 24, 1995, at F6.

of anger and racial hatred. In Bob's world view, no white woman could possibly consent to sexual contact with a black man. So when he saw his daughter kissing Tom, the only explanation had to be rape.

To Atticus, as Scout explains, Mayella and Bob "were absolute trash" (p. 134). In fact, Scout lets us know, she "never heard Atticus talk about folks the way he talked about the Ewells." Their lying nature was compounded by their general distastefulness. They were dirty, no-account, brutal, prolific, shiftless, diseased, and untrustworthy. Not at all the sort of "decent folks" whom Scout was reared to respect and honor.

And make no mistake, Scout had no respect at all for any of the Ewells, who lived behind the town garbage dump, competing with the "varmint" for refuse (p. 181). In Scout's words,

[e]very town the size of Maycomb had families like the Ewells. No economic fluctuations changed their status — people like the Ewells lived as guests of the county in prosperity as well as in the depths of a depression. No tr[ua]nt officers could keep their numerous offspring in school; no public health officer could free them from congenital defects, various worms, and the diseases indigenous to filthy surroundings. [p. 181]

Bob Ewell's face was "as red as his neck" (p. 181), and only "if scrubbed with lye soap in very hot water" would his skin be white (p. 182).

Scout's assessment of Mayella is slightly more sympathetic, but not much. "A thick-bodied girl accustomed to strenuous labor," she managed to look "as if she tried to keep clean" (p. 190). Intimidated and in tears from the moment she took the witness stand, to Scout it was all a ploy, in aid of her soon-to-be-told false testimony — "She's got enough sense to get the judge sorry for her" (p. 191). She had some sense of confidence, but "there was something stealthy about hers, like a steady-eyed cat" (p. 192). Mayella was a complete stranger to refinement or even manners. Said Scout, "I wondered if anybody had ever called her 'ma'am' or 'Miss Mayella' in her life; probably not, as she took offense to routine courtesy. What on earth was her life like?" (p. 194).

Scout soon found out the answer to that question, as Mayella's home life quickly became a theme in Atticus's cross examination. Mayella, the oldest of seven children (whom Scout derisively called "specimen" (p. 194)), had gone to school for only two or three years. Her family lacked money and almost all other necessities:

[T]he weather was seldom cold enough to require shoes, but when it was, you could make dandy ones from strips of old tires; the family hauled its water in buckets from a spring that ran out at one end of the dump — they kept the surrounding area clear of trash — and it was everybody for himself as far as keeping clean went: if you wanted

to wash you hauled your own water; the younger children had perpetual colds and suffered from chronic ground-itch; there was a lady who came around sometimes and asked Mayella why she didn't stay in school — she wrote down the answer; with two members of the family reading and writing, there was no need for the rest of them to learn. [pp. 194-95]

Perhaps worst of all, Mayella had no friends. To Scout, she seemed like “the loneliest person in the world.”⁹ She seemed “puzzled” at the very concept. “You makin’ fun o’me agin?” she asked, when Atticus pressed her on the subject (p. 195). At the end of her testimony, Mayella “burst into real tears,” and would not continue answering questions. Scout interpreted this as contempt on the part of the “poor and ignorant” witness (p. 200).

B. *Tom's Story*

Tom Robinson worked for Mr. Link Deas, which caused him to pass the Ewell shack every day on his way to and from the field. Mayella often called Tom to come “inside the fence” (p. 203) so that he could help her with chores. Tom refused payment, which caused Scout to think that he “was probably the only person who was ever decent to her” (p. 204). Tom echoed that thought: “[S]he didn't have nobody to help her. . . . I felt right sorry for her” (p. 209).

Tom never once “set foot on the Ewell property without an express invitation” (p. 204). On the day in question, Tom was returning from work when Mayella called him into the yard, and then asked him to do some work in the house. After Mayella herself shut the door, it occurred to Tom that the house was awfully quiet. He asked Mayella where the other children were. “She says — she was laughin’, sort of — she says they all gone to town to get ice creams. She says, ‘Took me a slap year to save seb’m nickels, but I done it. They all gone to town’” (p. 205).

Tom started to leave, but Mayella asked him to take a box down from a high chifforobe. He reached for it, and the next thing he knew “she'd grabbed me round the legs, grabbed me round th' legs” (p. 206). Then she “sorta jumped” on Tom, hugging him around the waist. Tom found it difficult to testify to the next part, but he swallowed hard and continued:

She reached up an' kissed me 'side of th' face. She says she never kissed a grown man before an' she might as well kiss a nigger. She says what her papa do to her don't count. She says, ‘Kiss me back, nigger.’ I say Miss Mayella lemme outa here an' tried to run but she got her back to the door an' I'da had to push her. I didn't wanta harm

9. P. 204. “[W]hite people wouldn't have anything to do with her because she lived among pigs; Negroes wouldn't have anything to do with her because she was white.” *Id.*

her, Mr. Finch, an' I say lemme pass, but just when I say it Mr. Ewell yonder hollered through th' window. [p. 206]

Charging into the room, Bob Ewell shouted, "[Y]ou goddamn whore, I'll kill ya" (p. 206). Seizing the opportunity, Tom ran, not out of guilt, but because he was scared and had no choice.

Tom did not claim that Mayella was lying, but only that she was "mistaken in her mind" (p. 210). He never had his eye on her, never harmed her, and certainly never raped her. It was Tom who resisted Mayella's advances (p. 207).

C. *Mayella's Story*

No one really believes Mayella. Not Atticus, and certainly not Scout. Not Judge Taylor, not Sheriff Heck Tate, and not even Mr. Gilmer, the county attorney whom Scout observes to have been "prosecuting almost reluctantly" (p. 201). Nor does it seem that the jury believed Mayella, since it took them a full two hours to bring the trial to its foreordained conclusion. That, of course, is the point of the book. Mayella is a sexually frustrated, love-starved aggressor, who lies her way out of a dilemma and participates in a judicial lynching in order to avoid revealing the truth.

But that is not the way Mayella tells it. She says she was raped. She says that she just offered Tom Robinson a nickel to "bust up" a piece of furniture. She went into the house for the money and "'fore I knew it he was on me. Just run up behind me, he did. He got me round the neck, cussin' me an' sayin' dirt — I fought'n'hollered, but he had me round the neck. He hit me agin an' agin" (p. 192).

Mayella fought tooth and nail, but she failed:

I don't remember too good, but next thing I knew Papa was in the room a'standin' over me hollerin' who done it, who done it? Then I sorta fainted an' the next thing I knew Mr. Tate was pullin' me up offa the floor and leadin' me to the water bucket. [p. 192]

She was positive that Tom had taken "full advantage" of her. "He done what he was after" (p. 192).

Mayella sparred with Atticus on cross examination. She denied his assertion that the beating was administered by her father. She denied that she had been the one to approach Tom. She insisted that she had never before asked Tom inside the fence. As to Atticus's main theory, that Tom's crippled left arm made him incapable of the crime she had described, Mayella raged "I don't know how he done it, but he done it — I said it all happened so fast I —" (p. 198). She continued:

I got somethin' to say an' then I ain't gonna say no more. That nigger yonder took advantage of me an' if you fine fancy gentlemen don't wanta do nothin' about it then you're all yellow stinkin' cowards,

stinkin' cowards, the lot of you. Your fancy airs don't come to nothin' — your ma'amin' and Miss Mayellerin' don't come to nothin', Mr. Finch. [p. 200]

Whatever the truth of the rape charge, Mayella clearly understood that everyone else in the courtroom considered her trash, hardly worth protecting. Throughout her testimony, as though she herself was on trial, she was nervous and jumpy. She cried repeatedly and she reacted with "terror and fury" (p. 200). That is also part of her story.

III. THE DEFENSE OF TOM ROBINSON

The purpose of a trial is to resolve competing factual narratives.¹⁰ Mayella (and her father) claimed that she had been raped by Tom Robinson. Tom denied the crime. Atticus was assigned to represent Tom. The stage was set for a trial.

In the mid-1930s (when the events took place) as in the early 1960s (when the book was published), one standard response to a rape charge was to plead consent. It is no surprise, then, that Atticus Finch defended Tom Robinson on that very ground; that is how rape prosecutions were defeated in those days.

Of course, Atticus did not merely raise consent. Rather, he used a specific form of the defense that can be particularly offensive, in both senses of the word. Let's call it the "she wanted it" defense. Mayella didn't merely agree to a little romance with Tom, she was the intense aggressor. She schemed and plotted for "a slap year" to get the children out of the house on an opportune day. She jumped on Tom, wrapped her arms around him, demanded that he kiss her, and blocked the door with her body when he tried to leave.

So Atticus Finch told a trial story¹¹ that was demeaning and stereotyped. True, he did it in a courteous and courtly manner, but Mayella easily realized what was being done to her. She and her family and her way of life were being placed on trial; she herself was being accused of a crime that could (and did) lead to a man's death. Did Atticus Finch have the right, or perhaps the duty, to treat Mayella in that fashion?

As a starting point, our evaluation of Atticus's conduct rests on an appraisal of Tom Robinson's guilt. There are three possibilities: (1) Tom Robinson was telling the truth, (2) Tom Robinson was lying, and (3) Atticus did not know and did not care about the truth of Tom Robinson's story.

10. See STEVEN LUBET, *MODERN TRIAL ADVOCACY* 1 (2d ed. 1997).

11. See *id.* at 4-8.

A. *If Tom Robinson Told the Truth*

Generations of readers (and moviegoers) have accepted Tom Robinson's account of how he befriended Mayella and was then betrayed by her. Given what we know of then-contemporary Southern mores and justice, his narrative is credible and compelling. And should there be any doubt, the physical evidence supports his innocence.

First, there was no medical examination of Mayella and, therefore, no physical evidence that a rape had occurred. Atticus refers to this as "lack of corroboration" (p. 232). More importantly, Mayella's blackened right eye, bruises, and other injuries were inconsistent with Tom's crippled left arm. All of this gives credence to Tom's story. And if Tom was truthful, then Atticus simply had no choice but to attack Mayella as he did. Advocacy means nothing if it doesn't mean bringing out the truth, no matter how painful, on behalf of the innocent.

To Atticus's credit, he was generally polite to a young woman who was clearly despised by virtually everyone else in the courtroom. But politeness can be intimidating in its own way, as it was to Mayella. And Atticus left no doubt that he intended to do his job. "Miss Mayella," he began his cross examination, "I won't try to scare you for a while, not yet" (p. 193).

So here we have Atticus Finch, seasoned courtroom warrior, marshaling all of his considerable skills and talents on behalf of his innocent client. This is the Atticus Finch of legend, beyond reproach or even criticism.

B. *If Tom Robinson Lied*

The story becomes substantially more confusing if we consider the possibility that Tom Robinson may have been lying about some or all of his contact with Mayella Ewell. To be sure, the narrator makes it clear that she believes Tom, and that we should believe him too. Nor do I mean to suggest that I reject his innocence.

On the other hand, Scout merely told the story and Harper Lee merely wrote the book. Neither one can control our interpretation of the finished text. A responsible reading of the novel ought to consider the possibility that Scout, worshipfully devoted to her father, might have misapprehended either the facts or the credibility of the witnesses.¹² And, as it turns out, there is much in the text that supports Mayella's story.

12. Texts are always open to interpretation, but even more so in the case of a book such as *To Kill a Mockingbird*, which lacks an omniscient narrator and is recounted entirely from the perspective of a seven-year-old child.

Of course, the primary evidence against Tom came from Mayella and Bob Ewell. The father and daughter were reasonably consistent in their accounts of the alleged rape, and neither one could be made to retract anything on cross-examination. They were steadfast; Mayella's "eye was blacked and she was mighty beat up" (p. 187).

Atticus's effective cross-examinations established that Mayella's right eye was injured and that her father, Bob, was left-handed, while Tom had no use of his left arm. This is meant to establish that Tom could not have administered the beating, since it must have come from the left side. But it does not strain credulity to conclude that he could have used his right hand to hit her right eye — either as her head was turned or perhaps with a backward slapping motion. Tom was a physical laborer, a powerful man who admitted that even with his damaged arm he was "strong enough to choke the breath out of a woman and sling her to the floor" (p. 209). For Mayella, the shock of being attacked might make it difficult for her to fight back effectively, or to remember the precise timing of the blows.¹³

There are other gaps in Tom's defense as well. He claimed that Mayella set out to seduce him, saving scarce nickels for "a slap year" so that she could send her siblings into town for ice cream. That story has its problems. It has Mayella lying in wait for an entire year, and then sending the children into town without even knowing whether Tom would show up on that particular day. Though Tom had to pass the Ewell cabin on his way to work for Link Deas, the attack occurred in November when there was no cotton to be picked. Tom still worked "pretty steady" for Mr. Deas in the fall and wintertime, but apparently not every day.

Tom's narrative requires us to believe that Mayella was cunning and predatory enough to hatch her plan, but she then doled out her year-long hoard of nickels without even knowing whether Tom would show up that day. If Mayella were truly as desperate as she is painted by Tom (and Scout), wouldn't she have made certain that her nickels would really be put to their intended use?¹⁴

13. There is yet another explanation for Mayella's injuries, one that shows the Ewells to be hiding something but that does not absolve Tom Robinson. Isn't it possible that Tom indeed raped Mayella, and that Bob Ewell beat up his daughter *after* discovering the rape? Rape victims are regularly blamed for what happened to them. It is easily imaginable that Bob Ewell, living in Maycomb, Alabama in the 1930s, might have taken out his anger on the victim of the crime. So the fact that Mayella protected her father does not mean that she lied about being raped.

14. Even if Mayella had seen Tom going to work at Mr. Deas's place that morning, she had no way of knowing when he would leave work for the afternoon at a time of the year when work was irregular. And though she managed to send her siblings off for ice cream, she obviously had no way of knowing, and could not control, when her father would return.

Rape is often described as a crime of opportunism. A counter-narrative, then, would be that Mayella had saved her nickels for no other reason than to give her siblings an otherwise unobtainable treat. Tom, as Mayella describes it, was in fact asked to help with some chores in the yard. Learning of the children's absence, he attacked her.¹⁵

Let me be clear that I do not sponsor this version; I am not arguing that Tom Robinson was a rapist. My point, however, is that Mayella's story is also coherent and supported by the facts adduced at trial. Atticus Finch undermined her credibility, but he did not, Scout's prejudices aside, prove Mayella to be a liar. As a simple matter of narrative interpretation, it is *possible* that Mayella was basically telling the truth.

Once we consider the possibility of Tom's guilt, and that Atticus might have known about it, we have to take a very different view of the cross-examination of Mayella Ewell. Was it ethical, could it still be admirable, for Atticus to treat Mayella as he did? Let us not pull any punches. Atticus *tortured* Mayella. He held her up as a sexual aggressor at a time when such conduct was absolutely dishonorable and disgraceful. Already a near outcast, Atticus ensured that Mayella could have no hope whatsoever of any role in polite society.

The "she wanted it" defense in this case was particularly harsh. Here is what it said about Mayella: She was so starved for sex that she spent an entire year scheming for a way to make it happen. She was desperate for a man, any man. She repeatedly grabbed at Tom and wouldn't let him go, barring the door when he respectfully tried to disentangle himself. And in case Mayella had any dignity left after all that, it had to be insinuated that she had sex with her father.¹⁶

15. Tom denied having sex with Mayella, but recall that Tom testified to Bob Ewell's words upon entering the cabin: "[Y]ou goddamn whore, I'll kill ya." P. 206. What would cause Bob to react that way if all he had seen was Tom trying to push his way past Mayella? Wouldn't the scene, as Tom depicted it, be more likely to cause Bob Ewell to be enraged at the intruder? On the other hand, if Bob really did see Tom "ruttin' on my Mayella," he could easily have reacted with anger and fury at his daughter.

And we must also ask why Mayella would go so far as to claim having been raped. Given the events as Tom gave them, a charge of attempted rape would obviously have served her purposes just as well, and without imposing upon her the stigma of a rape victim. Why would Mayella increase the import of her lie when the only result would be to make herself even more of a pariah in Maycomb? See JAMES GOODMAN, *STORIES OF SCOTTSBORO* 19 (1994) (quoting the statement of alleged rape victim, a white woman: "Those Negroes have ruined me and Ruby forever"); MARTHA HODES, *WHITE WOMEN, BLACK MEN* 66 (1997) (noting that white woman's claim of rape by black man led to her "maligning and ostracizing" by other whites).

16. "She says she never kissed a grown man before an' she might as well kiss a nigger. She says what her papa do to her don't count." P. 206. In Mayella's case, the explosive charge of incest seemed to evoke no outrage. Contrast the case of Richard Allen Davis, convicted in 1996 for the kidnapping, rape, and murder of a 12-year-old girl. See Elaine

In short, the defense of Tom Robinson employed most, if not all, of the well-worn negative conventions historically used to debase and discourage rape victims. One writer calls these "the most insulting stereotypes of women victims,"¹⁷ amounting to a judicial "requirement of humiliation."¹⁸

Does our view of Atticus change if it turns out that he dragged Mayella through the mud for the sole purpose of freeing the guilty?

C. *If Atticus Didn't Care*

The third possibility, in reality perhaps the most likely one, is that Atticus did not care about the relative truth of the charge and defense. He was appointed by the court to defend Tom Robinson, an obligation that he could not ethically decline or shirk. Atticus Finch was neither a firebrand nor a reformer. He had spent his career hoping to avoid a case like Tom's,¹⁹ but having been given one, he was determined to do his best for his client. Not every Maycomb lawyer would have done as much.²⁰

In the classic formulation, every person accused of a crime is entitled to a vigorous defense. Guilt or innocence do not figure into the equation; that is for the jury to decide, not the attorney. It is not uncommon for lawyers to avoid learning, or forming strong convictions, about their clients' guilt, since zealous advocacy is required in either case.²¹

Lafferty, *Final Outrage*, TIME, Oct. 7, 1996, at 64. At his sentencing, in an effort to save himself from execution, Davis testified that he had refrained from raping the child because she begged him, "Just don't do me like my Dad." *Id.* His slander of the victim and her family did not succeed. Judge Thomas C. Hastings said that Davis's defiant statement made it "very easy" to sentence him to death. *See id.* Moreover, incest victims tend to be characterized by fear and mistrust, not by aggressive promiscuity. Carol Lynn Mithers, *Incest and the Law*, N.Y. TIMES, Oct. 21, 1990, (Magazine), at 44; Jane Cornman, *Female Adolescent Response to Childhood Sexual Abuse*, JOURNAL OF CHILD & ADOLESCENT PSYCHIATRIC NURSING, Apr. 1997, at 17.

17. SUSAN ESTRICH, *REAL RAPE* 56 (1987).

18. *Id.* at 53.

19. *See* p. 97. For a further discussion of Atticus's *pro bono* practice, see Freedman, *supra* note 2, at 480.

20. Atticus's plans were discussed on the eve of trial by a group of court-house hangers-on:

"Lemme tell you somethin' now, Billy," [one] said, "you know the court appointed him to defend this nigger."

"Yeah, but Atticus aims to defend him. That's what I don't like about it."

P. 174.

21. Many lawyers and advocacy teachers, myself included, take the view that a lawyer *should* insist that clients tell counsel all about the events of the charged crime. Full disclosure is necessary to an adequate defense. *See* MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 61-69 (1975); MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 151-52 (1990) [hereinafter FREEDMAN, *UNDERSTANDING*]; LUBET, *supra* note 10, at 6.

Agnostic lawyers take their clients as they find them, assigning to themselves the task of assembling the most persuasive possible defense supported by the facts of the case. Their goal is to create a reasonable doubt in the mind of at least one juror, not to prove the innocence of the client. Innocence is irrelevant. Doubt is all that matters.

Doubt, in turn, may be found only in the mind of the beholder. A case is not tried in the abstract, but rather to a very specific audience. It is the lawyer's job — the advocate's duty — to identify and address the sensibilities, predispositions, insecurities, and thought patterns of the jury. Following this model, Atticus Finch defended Tom Robinson neither in the name of truth nor in disregard of it. He defended Tom Robinson in a way that he hoped might work.²²

IV. RECONSIDERING THE RAPE DEFENSE

Modern feminist writers have shed much light on the "classic" trial of rape cases, exposing the manner in which accepted defenses were built upon layers of myth, prejudice, and oppression of women. In the once venerated but now much discredited words of English Chief Justice Lord Matthew Hale, rape was considered a charge "easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent."²³

The general suspicion of rape victims was at times so great as to cause Dean John Henry Wigmore, the great expositor of the common law of evidence, to call for mandatory psychiatric evaluation before a complainant's testimony could be heard by a jury. "[Rape complainants'] psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions."²⁴

There seems little doubt that Atticus Finch shared this mistrust of women, or at least those who claimed to have been sexually assaulted. He twice told the jury that Mayella's testimony was uncorroborated. Later, after the verdict, he told his children that he had "deep misgivings when the state asked for and the jury gave a death penalty on purely circumstantial evidence," adding that there

22. Atticus no doubt was aware that his southern, Christian, Bible-reading jurors would be familiar with the basis for his defense. It parallels the biblical tale of Potiphar's wife. As the jurors surely knew, she attempted to seduce Joseph, who refused her advances. She spitefully accused him of rape, which led to his imprisonment by Pharaoh. See *Genesis* 39:7-20.

23. 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* *635, quoted in Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554, 558 (1993).

24. 3A JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 924a (James H. Chadbourne rev. ed., 1970), quoted in *ESTRICH*, *supra* note 17, at 48.

should have been "one or two eyewitnesses" (p. 232). Of course, Mayella's testimony was corroborated and there were two eyewitnesses. But in Atticus Finch's view, Mayella and Bob Ewell were not simply inadequate witnesses; they apparently did not count at all.

As to the jury, Atticus understood that "people have a way of carrying their resentments right into a jury box" (p. 233). He had a low opinion of the veniremen, who "all come from out in the woods." He knew that the case had to be pitched to their prejudices, understanding that "we generally get the juries we deserve" (p. 234). Perhaps Atticus thought he was speaking only of race, but can there be any doubt that the all male jury was prejudiced against women as well? Atticus could not help smiling when he explained to Scout why Alabama prohibited women from serving on juries. "'I guess it's to protect our frail ladies from sordid cases like Tom's. Besides,' Atticus grinned, 'I doubt if we'd ever get a complete case tried — the ladies'd be interrupting to ask questions.'"²⁵

It was against this backdrop of wariness and condescension that Atticus Finch, rightly or wrongly, designed his defense to exploit a virtual catalog of misconceptions and fallacies about rape, each one calculated to heighten mistrust of the female complainant.²⁶

Fantasy. It appears to be an age-old male fantasy that women dream about rape. According to the defense, Mayella obsessed over Tom for a "slap year," saving scarce money and contriving to have her siblings away so that she could lure him into an assignation. With no provocation or encouragement, she seems to have deluded herself into believing that her passion might be reciprocated. Perhaps she even succeeded in bringing herself to believe that she had been raped. Since it was widely held that "stories of rape are frequently lies or fantasies,"²⁷ it would seem natural to paint Mayella as suffering from one of the "psychic complexes" of "errant young girls,"²⁸ which can result in deliberately false charges born of "sexual neurosis."²⁹ After all, as every court knows,

25. P. 234. Questions indeed!

26. See generally Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013 (1991).

27. Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1138 (1967), quoted in ESTRICH, *supra* note 17, at 43.

28. *State v. Anderson*, 137 N.W.2d 781, 783 (Minn. 1965); see also *State v. Wulff*, 260 N.W. 515, 516 (Minn. 1935). The *Wulff* case, it may be noted, was decided in 1935, the very year in which *To Kill a Mockingbird* was set.

29. *Anderson*, 137 N.W.2d at 783 n.2 (quoting Glanville Williams, *Corroboration — Sexual Cases*, 1962 CRIM. L. REV. 662, 662).

"[p]sychiatric experience tells us that [sexual] fantasies are far from uncommon."³⁰

Spite. Another sad stereotype is that of the spurned woman who cries rape in revenge. Tom, though kind to Mayella when she needed help around the house, resisted her sexual advances and refused to fulfill her physical needs. In return, she branded him a rapist and "she looked at him as if he were dirt beneath her feet" (p. 204). In the 1950s, no less an authority than the Model Penal Code endorsed the concept that women lodged false rape charges out of anger or hostility, citing an ostensibly well-founded fear that "bitterness at a relationship gone sour might convert a willing participant in sexual relations into a vindictive complainant."³¹

Shame. It seems hardly to need saying that women lie out of shame. Atticus told the jury that Mayella lied "in an effort to get rid of her own guilt. . . because it was guilt that motivated her. . . . She must destroy the evidence of her offense" (p. 216). This is a theme that is played over and over in the literature on rape. An article in the *Stanford Law Review* once referred to this alleged phenomenon as motivated by "moralistic afterthoughts."³² One court believed that "sexual cases are particularly subject to the danger of deliberately false charges . . . simply [because of] a girl's refusal to admit that she consented to an act of which she is now ashamed."³³ To another court, it was obvious that "even young girls, like older females, sometimes concoct an untruthful story to conceal a lapse from virtue."³⁴

Sexuality. In the lexicon of rape defense, sexuality is closely related to shame and no less likely to cause a woman to lie about being the victim of a crime. Since women can barely control, and sometimes cannot even understand, their desires, they proceed to victimize the men whom they ensnare. As Atticus explained it,

She knew full well the enormity of her offense, but because her desires were stronger than the code she was breaking, she persisted in breaking it. . . . She was white, and she tempted a Negro. . . . No code mattered to her before she broke it, but it came crashing down on her afterwards. [p. 216]

30. *People v. Scholl*, 37 Cal. Rptr. 475, 478 (Ct. App. 1964), quoted in Ann Althouse, *The Lying Woman, The Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 Nw. U. L. Rev. 914, 955 (1994).

31. MODEL PENAL CODE AND COMMENTARIES § 213.6 cmt. 5 (1980), quoted in ESTRICH, *supra* note 17, at 54.

32. Note, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680, 685 (1966), quoted in ESTRICH, *supra* note 17, at 38.

33. *Anderson*, 137 N.W.2d at 783 n.2 (quoting Glanville Williams, *Corroboration — Sexual Cases*, 1962 CRIM. L. REV. 662, 662).

34. *State v. Connelley*, 59 N.W. 479, 481 (1894).

According to a Note in the *Yale Law Journal*, "[a] woman's need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feelings which might arise after willing participation."³⁵ Not to be outdone, the *Stanford Law Review* wrote that "[i]t is always difficult in rape cases to determine whether the female really meant 'no.' . . . [A] woman may note a man's brutal nature and be attracted to him rather than repulsed."³⁶

Confusion. Women may be so confused about sex that they do not even understand what they themselves have done. Mayella, who lived among pigs, whose family was unwashed and illiterate, was pitiable in her "cruel poverty and ignorance" (p. 216). And so the cross-examination proceeded to show her dazed unreliability. She could not keep her story straight and she could not provide a blow-by-blow description: "You're becoming suddenly clear on this point. A while ago you couldn't remember too well, could you? . . . Why don't you tell the truth, child?" (pp. 198, 199). To one court, a victim's somewhat "inconsistent and confused" inability to recount a precise chronology of a gang rape was considered reason enough to reverse a conviction, though the defense version was that she had pushed a dirty stick into her own vagina until her cervix bled.³⁷ Ignorance and confusion are the rapist's friend. Professor Ann Althouse reports that a pornographic magazine once advised its readers that a man "doesn't have to worry if he rapes a retarded girl because nobody will believe the testimony of a 'scrunch face.'"³⁸

The advocate's job is to provide the jury with reasons for acquittal. Atticus Finch gave his jury at least five separate justifications for believing that Mayella "wanted it." She lied, he told them, perhaps in fantasy, or out of spite, or in shame, or as a result of sexual frustration, or maybe just because she was confused.

It would be easy to dismiss the defense strategy as archaic or outdated. As a man of his times, confronting a jury even less enlightened than most, what choice did Atticus Finch have other than to plead the consent defense as he did? But the "she wanted it" defense is hardly an anachronism. It continues to this day in cases

35. Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 *YALE L.J.* 55, 67 (1952).

36. Note, *The Resistance Standard in Rape Legislation*, 18 *STAN. L. REV.* 680, 682 (1966) (quoting Ralph Slovenko, *A Panoramic Overview: Sexual Behavior and the Law*, in *SEXUAL BEHAVIOR AND THE LAW* 5, 51, 54 (Ralph Slovenko ed., 1965)).

37. See *Commonwealth v. Bohannon*, 378 N.E.2d 987, 989 (Mass. 1978), cited in Althouse, *supra* note 30, at 917, 963-65.

38. Althouse, *supra* note 30, at 967 n.267 (citing Barry W. Lynn, 'Civil Rights' Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation, 21 *HARV. C.R.-C.L. L. REV.* 27, 89 n.205 (1986) (quoting from an unnamed publication)).

involving sexual assault. A cursory sample of recent newspaper stories reveals that the defense is alive and enticing.

In one case, a young woman, described as "mildly retarded," was sexually penetrated with a baseball bat and a broom handle while thirteen teenage boys watched or participated. The defense lawyers argued that the victim was "an oversexed aggressor who welcomed and enjoyed all the sexual activities."³⁹ In the rape prosecution of a drill sergeant at the Army's Aberdeen Proving Ground, the defense asserted that the defendant's accusers were "habitual liars who openly yearned to have intimate relations with him."⁴⁰ In another Army sexual harassment case, defense counsel asked one of the complainants whether "she offered to have an abortion" to curry favor with the defendant;⁴¹ another complainant was "depicted as someone who thought her husband was a wimp, who might have been interested in other men and who told coarse sex-oriented jokes to male co-workers."⁴² In another widely publicized rape case, the victim identified herself and held a press conference because she felt sullied by the defense lawyer,

who accused her of using drugs that night and of agreeing to have sex with Mr. Kelly. [The lawyer] said she had concocted a tale of rape out of shame of losing her virginity in the back of a Jeep to an 18-year-old she had just met, a youth with whom she would have no future because he had a girlfriend.⁴³

The above examples are from a few high-profile cases, the ones that were reported in the press during the weeks prior to this writing. It is a virtual certainty that there were many more cases — dozens, perhaps hundreds — that saw the same defenses used in similar, if not more aggravated, circumstances.

The "she wanted it" defense, in its several iterations, is ultimately an advocacy tool. It is a rhetorical device utilized in the hope that it will prevail. The lawyers who employ the defense are not pro-rape zealots. They are, instead, amoral technicians, doing their best to assemble and present the arguments and pleas most likely to result in an acquittal.

This does not soften the impact of the defense on the victims, however, nor does it justify the humiliating "second rape," the tra-

39. Robert Hanley, *3 Men are Jailed in Glen Ridge Sexual Assault Case*, N.Y. TIMES, July 1, 1997, at B4.

40. See Neil A. Lewis, *Sergeant's Lawyers Start Case by Accusing 2 of His Accusers*, N.Y. TIMES, Apr. 22, 1997, at A12.

41. See Elaine Sciolino, *Accuser of Army's Senior Soldier Says He Should Face More Serious Charges*, N.Y. TIMES, June 27, 1997, at A15.

42. Neil A. Lewis, *Accuser Is Criticized in Army Sex Case*, N.Y. TIMES, July 2, 1997, at A18.

43. Monte Williams, *Victim of Rape Goes Public After 11 Years of Nightmares*, N.Y. TIMES, June 20, 1997, at A1.

dition of character assassination,⁴⁴ that seems to be the stock in trade of so many defense lawyers.

V. RECONSIDERING THE DEFENSE LAWYER

To Kill a Mockingbird was intended, above all, to be a story about race and racial oppression. In the America of 1960, the topic was daring and the points were probably best driven home through the use of didactic characters, almost stick-figures. Atticus is good and noble, Tom guiltless and pure of heart, Mayella low-born and conniving. We know, of course, what Harper Lee intended, and the flaws in Tom's defense are really just weaknesses in the author's storytelling. But the flaws go unnoticed because the readers, earnestly complicit in the story, are anxious for Tom's vindication.⁴⁵

If Atticus Finch accurately gauged the jury that he faced, so too did Harper Lee understand hers. For Tom to be the most believable, Mayella must be the most disgraceful. We can no doubt all agree that in the fight against racism, a little class and gender bias can be an effective literary device. In formula fiction, the job of means is to bring us steadily to the end.

But how does that work in real life? When would a real Atticus Finch be justified in eviscerating a real Mayella Ewell in order to defend a real Tom Robinson? Always?⁴⁶ Never?⁴⁷ It depends?⁴⁸ The absolute positions have their adherents, and the arguments are compelling on both sides. But this is not the place to rehearse at length the considerable literature criticizing and defending the adversary system.

Suffice it to say that adversary system purists cannot allow themselves to care about the defendant's innocence or guilt, insisting instead on counsel's utmost efforts to obtain an acquittal in either circumstance. We have all heard it said that,

an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all

44. See Althouse, *supra* note 30, at 949, 966; see also GREGORY MATOESIAN, REPRODUCING RAPE: DOMINATION THROUGH TALK IN THE COURTROOM (1993) (discussing the role of language in transforming a woman's experience of rape into consensual sex at trial); Torrey, *supra* note 26, at 1056.

45. I am grateful to Ann Althouse for this insight.

46. Professor Monroe Freedman writes, "the imperatives of the adversary system properly require that every available argument be exploited by the criminal defense lawyer, even if he knows the client is guilty." Letter from Monroe Freedman (July 20, 1997) (on file with author).

47. Professor Dorothy Roberts writes, "[w]e shouldn't use sexist, racist, or classist myths to defend innocent clients, either." Letter from Dorothy Roberts (Sept. 10, 1997) (on file with author).

48. Professor Mary Becker writes, "[h]ow could torturing Mayella possibly be justified morally if she is telling the truth, regardless of legal ethics?" Letter from Mary Becker (July 24, 1997) (on file with author).

means and expedients, and at all hazards and costs to other persons . . . is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.⁴⁹

Other writers, perhaps we should call them communitarians or relationalists, are more distressed by the dangers that the adversary system poses to "human or emotional equities."⁵⁰ In this regard, they are concerned that full-bore advocacy, for either party, may do irreparable harm to all involved.

For the traditionalists, then, the "she wanted it" defense would always be permissible (and perhaps even required), so long as it could be raised within the applicable rules of evidence. Among postmodernists, or certain of them, the defense would always be suspect, since it represents an assault on human dignity. I would venture, however, that most lawyers (and most observers of lawyers) would try to steer a middle ground, giving restrained approval for such a defense when counsel was convinced of its truth, yet denouncing it if used simply as a ploy.

Consider another cross examination from another famous rape trial. On March 25, 1931, nine young African-American men were arrested in Paint Rock, Alabama, and charged with the forcible rape of two white women. The alleged crime was said to have occurred on a moving train. It was brought to the attention of the authorities by a number of white youths who had been thrown off that same train by several of the eventual defendants. The matter was brought to trial in Scottsboro, Alabama, and it therefore became known as the Scottsboro Case.⁵¹

The initial trial of the case was held only twelve days after the arrests. The entire county bar was appointed to represent the defendants, which, predictably, amounted to no defense at all. Eight of the nine defendants were found guilty and sentenced to death.⁵² This outrage soon made the Scottsboro Case a national cause célèbre, bringing the entire issue of lynch law and racial justice into the international spotlight.⁵³ One thing was clear: the Scottsboro

49. TRIAL OF QUEEN CAROLINE 8 (1821), *quoted in* FREEDMAN, *UNDERSTANDING*, *supra* note 21, at 65-66.

50. See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 6-7 (1996).

51. See GOODMAN, *supra* note 15.

52. The procedural history of the case is complex, involving seven separate retrials and two important decisions by the United States Supreme Court. See *Powell v. Alabama*, 287 U.S. 45 (1932) (requiring meaningful access to counsel in capital cases); *Norris v. Alabama*, 294 U.S. 587 (1935) (prohibiting systematic exclusion of minorities from jury rolls).

53. The NAACP and the International Labor Defense (a Communist Party affiliate) vied for control of the defense of the case, in which they were supported by the great weight of public opinion, at least in the North.

boys, as they were then called, were plainly innocent, the targets of a racially motivated frame-up.⁵⁴

Once the original convictions were vacated by the Supreme Court,⁵⁵ Samuel Leibowitz, one of the foremost trial lawyers in America, arrived from New York to lead the defense. His position was simple. There had been no rape. The two women brought the false charges in order to cover up their own misconduct on the train.⁵⁶

The defense did not stop there, however. The alleged victims, Victoria Price and Ruby Bates, were portrayed as the last sort of people to be believed — promiscuous tramps at best, more likely prostitutes. Following the first convictions, affidavits were filed in court reporting that the two women were “notorious prostitutes and one of them . . . was arrested in a disorderly house in *flagrante delicto* with a colored man.”⁵⁷ Another source claimed that “it made no difference whether she slept with a white man or a negro to her and they would both get drunk and they danced with and embraced colored men, and would hug them and kiss them.”⁵⁸ One of the women was said to have asked to “meet and have intercourse with three men [on one] afternoon.” The other was described as “dressed in a lewd and almost nude fashion” and “drunk and in a fight with another woman and she had her clothes up around her body . . . and exposed her private parts [in] a drunken, disgraceful spectacle in the presence of a number of colored people.”⁵⁹

At the first retrial, Victoria Price had to endure Samuel Leibowitz’s ferocious cross examination, which was described by one reporter as “the shredding of her life with a patient scalpel.”⁶⁰ Price had committed adultery and prostitution; she “treated” with black men; she traded “sex for liquor, favors, money, food, compan-

54. One of the alleged victims, Ruby Bates, subsequently recanted the charges. She testified for the defense at several of the retrials and toured the country raising support and funds for the defendants. Though it took over 40 years, even the State of Alabama eventually acknowledged the innocence of the Scottsboro defendants when Clarence Norris, the last survivor among them, was pardoned in 1976 on the basis of “innocence.” That decree, signed by then-Governor George Wallace, marked the first time in its history that Alabama conferred a pardon on the basis of innocence rather than forgiveness. See William K. Rashbaum, *Funeral Held for Last ‘Scottsboro Boy,’* UPI, Jan. 31, 1989.

55. See Powell, 287 U.S. at 45.

56. The likelihood of a false rape charge was taken for granted at the time. Supporters of the Scottsboro defendants pointed out that this was “a common experience in the pathology of women,” and that “nine out of ten charges of rape are false and are due to a peculiar psychological condition of the woman.” These “rape fantasies” often misled even the most experienced judges, leading to the conviction of innocent men accused of rape by hysterical women. See GOODMAN, *supra* note 15, at 167-71, and sources cited therein.

57. *Id.* at 184.

58. *Id.*

59. *Id.* at 184-86, and sources cited therein.

60. *Id.* at 192.

ionship, and love.”⁶¹ Following that *tour-de-force*, one headline read “Leibowitz Impales Price Girl as Prostitute.”⁶²

The assault on Victoria Price⁶³ was made all the more brutal by the fact that it was designed solely to degrade her, and not to develop any evidence actually relevant to the case. The defense, after all, was that the alleged intercourse had never occurred. There was no claim of consent, much less prostitution. Thus, the women’s purported proclivities to have sex for hire and to “treat” with “negroes” had scant factual bearing on the case as it was tried.⁶⁴

The Scottsboro case, then, sets the advocacy issue in severe relief. The cause was unquestionably just, yet the tactics were absolutely ruthless. Was it right or wrong to humiliate Victoria Price? Did Samuel Leibowitz have any choice, with the lives of his innocent clients on the line? Can any rule of legal ethics, however, depend upon the lawyer’s faith in the particular client who, after all, must by law be presumed innocent in every case?⁶⁵

The answer, I believe, is at once both stark and subtle. Advocates will use the tools they have. The adversary system all but ensures that every *available* argument will be employed.⁶⁶ Until prohibited or restricted or discredited or declared out of bounds, every line of defense *will be exploited*. Facts, character, bias, innuendo — it is counsel’s job to locate the fault lines in the prosecution’s case. Faced with the alternative of a client’s imprisonment or worse, the defense lawyer will fasten on vulnerability just as predictably as manure draws flies.

In practice, trial lawyers are the ultimate positivists; concerned mainly about what the law allows, they wonder little over the mean-

61. *Id.* at 192-93, and sources cited therein.

62. *Id.* at 193 (quoting Mary H. Vorse, *The Scottsboro Trial*, NEW REPUBLIC, April 19, 1933, at 277).

63. By the time Leibowitz entered the case Ruby Bates had become a defense witness.

64. The tactic of character assault is venerable if not respectable, dating back at least a century prior to the events in *To Kill a Mockingbird*. In 1829, a white woman in Virginia named Amy Baker accused a slave of rape. A witness for the defendant, a white man, gave testimony that he himself had “been to the house of Mrs. Baker for the purpose of unlawful intercourse with females.” Another witness had “seen four negro men” at Amy’s house on one occasion “and three negro men there at another time,” as though this were proof of low character. See HODES, *supra* note 15, at 58.

65. The argument is familiar, though that makes it no less meaningful. If vigorous advocacy is allowed only on behalf of clients who protest their innocence, the nearly certain result is that clients will refrain from making candid admissions to their lawyers. The consequence would not be fewer nasty cross examinations, but rather fewer pleas of guilty.

66. Samuel Leibowitz no doubt saw himself as doing no more than fighting fire with fire. He had to endure the anti-Semitic taunts of the prosecution and the constant reference to the defendants as “niggers.” When Leibowitz objected, one prosecutor replied, “I ain’t said nothin’ wrong. Your Honor knows I always make the same speech in every nigger rape case.” The defense objection was not sustained. See Eric J. Sundquist, *Blues for Atticus Finch*, in *THE SOUTH AS AN AMERICAN PROBLEM* 181 (Larry J. Griffin & Don H. Doyle eds., 1995).

ing of virtue. Thus, the "she wanted it" defense and others like it are sure to be bruited about whenever a case lacks an alibi.

To be sure, restraints on defense tactics in rape cases are justified, necessary, and long overdue, but they will have to come primarily from the courts and legislatures.⁶⁷ Judges can prohibit cross examinations when they are irrelevant and degrading; legislatures can fill the gaps in current "rape shield" provisions. Trial counsel, no doubt, will proceed to work the interstices, and the process of reform will continue where it can. While it is not too much to ask lawyers to reform themselves, it is unrealistic to suppose that they will.⁶⁸

For proof of this proposition, we need only return to Atticus Finch. As Scout's "love story" to her father makes plain, Atticus was a man of decency, honor, compassion, and courage.⁶⁹ If he embraced the "she wanted it" defense, what ordinary lawyer could resist?⁷⁰ Atticus was able to recognize and rise above the race prejudices of his time, but he was not able to comprehend the class and gender prejudices that suffused his work. As he understood his obligations to his client, he was compelled to treat Mayella Ewell as he did. His disregard of even the slightest possibility that she might have been telling the truth evidences an ethical — moral? social? — failing, though not a professional one. In Atticus Finch, whose compensating virtues are universally respected, it is a failing that generations of admiring readers have readily forgiven or overlooked.

VI. RACE, CLASS, AND GENDER IN MAYCOMB, ALABAMA

Atticus Finch, a pillar of the Maycomb establishment, mistrusted Mayella Ewell and believed Tom Robinson. In the

67. See, e.g., FED. R. EVID. 412 (rape shield); Leigh Bienen, *Rape Reform Legislation in the United States: A Look at Some Practical Effects*, 8 VICTIMOLOGY 139 (1983) (reviewing protective measures enacted 1975-80); Dorothy Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993) (discussing efforts to reform rape law).

68. Of course, it is not the defense alone that must be regulated. The abuses of prosecutors, though not the subject of this essay, have been well chronicled. See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986) (using peremptory challenges to exclude jurors on the basis of race).

69. "Atticus Finch has been studied by attorneys for the quality of his moral character, and his cinematic portrayal by Gregory Peck as a man of great tenderness and justice is so ingrained in American consciousness as to make him nearly impossible to imagine otherwise." Sundquist, *supra* note 66, at 192.

70. Nor could Atticus resist indulging in some creative exaggeration when he argued to the jury. During the cross examinations of Bob Ewell, Sheriff Tate, and Mayella Ewell, Atticus had taken pains to imply that Mayella's blackened right eye was injured by a left-handed blow. There was no evidence about the angle of impact that might have caused her other bruises. By final argument, however, Atticus had it that "Mayella Ewell was beaten savagely by someone who led almost exclusively with his left." P. 216. Apparently, even the most honest lawyers can fall prey to the temptation of embellishment.

Alabama of 1935, or even 1960, that was no small achievement. The "code" of his time and place required that a white woman's word always be accepted and that a black man was never to be trusted. Atticus was not a civil rights crusader, but he was able to look past race in structuring his defense. He was even optimistic that the jurors might see the light and agree with him. Surely there had been other racial injustices in Maycomb, but we have no hint that any prior incident had ever stirred Atticus to action. He was, if anything, indulgent of the tendency to prejudice, and almost amused by the Ku Klux Klan.⁷¹ What was special about the prosecution of Tom Robinson? What was it that enabled Atticus Finch to take his worthy stand?

Perhaps the time was right. Perhaps, upon appointment by the court, his duty was simply clear. And perhaps the social structure of Maycomb actually depended upon the humiliation of Mayella Ewell, even while it required the conviction of Tom Robinson. The Ewells, after all, were a disappointment to their race. Social outcasts, they were drunk, illiterate, filthy, welfare-dependent, and worse. Tom Robinson, on the other hand, was a "respectable Negro," polite, hard working, and not a trouble-maker. Did Tom ever once set foot on the Ewell property without an "express invitation from one of them?"

"No suh, Mr. Finch, I never did. I wouldn't do that, suh." [p. 204] Scout believed Tom, because he fulfilled his assigned part in the social structure, as she well understood.

"He seemed to be a respectable Negro, and a respectable Negro would never go up into somebody's yard of his own volition." [p. 204] Tom was so respectable, that he did not even attempt to shoulder his way past Mayella, desperate as he was to escape from his awful dilemma.

"Mr. Finch, I tried. I tried 'thout bein' ugly to her. I didn't wanta be ugly, I didn't wanta push her or nothin'." [p. 207] To be sure, Tom's propriety was so well regarded in Maycomb that Mr. Link Deas, his employer, interrupted the trial to shout from the spectators' gallery.

"I just want the whole lot of you to know one thing right now. That boy's worked for me eight years an' I ain't had a speck o'trouble outa him. Not a speck." [p. 207]

In other words, Tom knew his place.⁷² He played his prescribed part, fitting into Maycomb society, presenting no challenge and no

71. See p. 157; Freedman, *supra* note 2, at 475-76 (observing that Atticus referred to the Klan as a "political" organization, Professor Freedman asks, "David Duke, can you use a campaign manager who looks like Gregory Peck?").

72. Indeed, it may be that Tom's death, ostensibly as he attempted to escape from prison, could have been avoided if only he had remained passive and stoic. Perhaps Atticus's appeal would have succeeded. See Phelps, *supra* note 5, at 527.

affront. He was the sort of "quiet, respectable, humble Negro" (p. 216) who would stand aside deferentially as white people passed.⁷³

Mayella and her father, though, were just the opposite. They broke the mold, insulted the norms, violated the rules and the culture. They were the very contradiction of everything that the "fine folks" of Maycomb stood for. If Tom Robinson never caused a "speck o'trouble," the Ewells were pure trouble.⁷⁴

Can there be any doubt that this unexpected role reversal — the proper Negro versus the offensive whites — allowed Atticus Finch, and to a lesser extent even the sheriff (and perhaps even the judge and the prosecutor), to see class, perhaps for the first time, as a more salient characteristic than race? Of course, in the Alabama of 1935, race could not be dismissed. Innocent or guilty, Tom Robinson had to pay the price for allowing himself to get into an unforgivable predicament. But neither could class or gender be overlooked. As surely as Tom had to be convicted, Mayella Ewell, again, innocent or guilty, had to be disgraced.

VII. CONCLUSION

Where does this leave us, and what do we think now of Atticus Finch? At the very least we must renew our respect for his skill as an advocate. It is a great accomplishment, of course, to compel a bigoted Alabama jury to hesitate before convicting an innocent black man. But it would take a monumental performance indeed to accomplish that same feat for a guilty defendant. On a purely technical level, it is safe to say that Atticus remains an icon, if not an idol.

The moral problem is more difficult, if not intractable. Whether Tom was innocent or guilty, Atticus no doubt fulfilled his obligations under the standard conception of professional ethics. But that only brings us directly to the hardest question of all: Is Atticus still a hero? Does his moral standing depend on Tom's innocence, or can we still idealize him if it turns out that Tom committed the crime? If Atticus knew, or ignored the possibility, of Tom's guilt, does that reduce him in our eyes to a talented, but, shall we say, morally neutral actor?

73. See *id.* at 528 (describing how Maycomb's black citizens deferred to whites, even in their own church).

74. Atticus defined the social structure for his children: "There's nothing more sickening to me than a low-grade white man who'll take advantage of a Negro's ignorance." P. 233. Tom, ignorant but upright, merited Atticus's approval. Mayella, a low-grade white woman if ever there was one, brought down his contempt.

Worthlessness seems to have been a genetic trait among the Ewells. Ten-year-old Burris Ewell, beginning first grade for at least the third time, succeeded in bringing tears to his teacher's eyes when he shouted "[a]in't no snot-nosed slut of a schoolteacher ever born c'n make me do nothin'!" P. 34.

I confess that, as of this writing, I have not been able to arrive at a satisfactory answer. I am able to see the social value to vigorous defense and I can appreciate the principle that all — even the guilty and especially the despised — must be defended. But the willingness to rely upon cruel stereotypes, to play the “gender card,” should be criticized not applauded.

Of course, a law review article must reach a conclusion (or at least the semblance of one). I am therefore grateful to the editors of the *Michigan Law Review* for soliciting the comments that follow. Lacking resolution from me, the editors have turned to a panel of experts for their wisdom on the question that I cannot manage to resolve unaided. Readers are urged to consider the insights of Ann Althouse, Robert E. Atkinson, Jr., Burnele V. Powell, William H. Simon, and Randolph N. Stone and decide for themselves whether Atticus Finch is a paragon of honor or an especially slick hired gun.